No. 20134

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WASHINGTON STATE BOWLING PROPRIETORS ASSOCIATION, INC., a corporation, **PIERCE-OLYMPIC BOWLING PROPRIETORS ASSOCIATION, INC.**, a corporation, **TOWER LANES, INC.**, a corporation, **BOWLERO, INC.**, a corporation, **DAFFODIL BOWL, INC.**, a corporation, **PARADISE BOWL, INC.**, a corporation, **C. A. LOYD** and **JANE DOE LOYD**, his wife, d/b/a **SIXTH AVENUE LANES, THEODORE TADICH** and **JANE DOE TADICH**, his wife, **DEZ ISAACSON** and **JANE DOE ISAACSON**, his wife, **KENNETH KULM** and **JANE DOE KULM**, his wife, **PHILLIP CUNNINGHAM** and **JANE DOE CUNNINGHAM**, his wife, **CLEVE REDIG** and **JANE DOE REDIG**, his wife, and **ART UNKRUR** and **JANE DOE UNKRUR**, his wife,

Appellants,

vs.

PACIFIC LANES, INC., a corporation,

Appellee.

Appeal from the United States District Court for the Western District of Washington, Northern Division.

Honorable **William J. Lindberg**, District Judge.

Appellants' Petition for Rehearing

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Service of the within brief for Appellants is hereby accepted in Seattle, Washington, the day indicated by receiving three copies thereof.

.....day of ....., 1965

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To The Honorable Stanley N. Barnes, M. Oliver Koelsch, and James R. Browning, Circuit Judges of the United States Court of Appeals for the Ninth Circuit:

Pursuant to Rule 23 of the Rules of this Court, defendant-appellants pray that this Court grant rehearing and

reconsider its judgment of February 2, 1966 for the following reasons:

I.

This Court has twice in finding a basis for affirmance, stated that the district court did *not* instruct the jury that the eligibility rule was per se violation, but rather defined a group boycott in general terms and "left it to the jury to determine whether or not the eligibility rule was in fact a group boycott." (Slip. Op. pp. 5, 7.) This misapprehends the nature of the instructions, for they told the jury that a group boycott had been effected. After stating the nature and effect of per se violations, thus fixing in the jury's mind the link between price fixing and group boycotts *as examples,* the trial court gave the boycott instructions, immediately followed by the price fixing instructions (Tr. 2773-4):

[Boycott Instructions]

"For purposes of this case, a group boycott may be defined as the concerted refusal of a group of persons engaged in some line of commerce to deal with others—that is, to sell their goods or services to others—unless the potential customers agree that they will not do business with other firms which are competitors of the persons in the group. In other words, a group boycott is a combination of business concerns to boycott potential customers unless the customers restrict their trade and custom to the members of the group and avoid patronizing outside competitors.

"A group boycott is unlawful even though those who are parties to it claim that it was adopted for the purpose of eliminating practices thought by them to be trade abuses or undesirable trade practices."

[Price Fixing Instructions]

"The plaintiff claims that the defendants entered into a conspiracy or combination to fix the price charged for bowling. *If you should find that the defendants did conspire to fix the price charged for bowling in Western Washington,* and the conspiracy—if any existed—did not substantially affect the flow of interstate commerce, in other words, it was a purely local conspiracy, then there would be no violation of the antitrust laws. However, if you find that some amount of interstate commerce was affected, and that amount was not insignificant, as I will more fully explain later, then any conspiracy to fix prices would be a violation of the federal antitrust laws." (Emphasis added.)

In contrast with the price fixing instructions, no opportunity was given to the jury to reach a decision on the issue: "*If* you should find that the defendants did conspire to establish a group boycott, ..." The crucial fact issue, "was the eligibility rule a group boycott" was effectively withdrawn from the jury. Appellants respectfully submit that this Court would not want to deny them a jury verdict on this issue — yet this has been the result herein.

II.

The questions of law respecting group boycotts in this case are novel and are not answered by the *Klor's, Radiant Burners'* or *Jerrold Electronics* decisions. As contrasted with those instances of group action withholding all dealings essential to the victim's business, the eligibility rule is not a refusal "to deal with customers"; if it can be termed a refusal to deal at all, it is with respect to non-customers, *i.e.,* a disqualification of customers of non-members to bowl in appellants' tournaments. This Court has now labeled as illegal per se an eligibility rule for a limited number of bowling tournaments, having application only to a small number of the multitude of recreational bowlers and having no direct effect on commerce. This disregards the Supreme Court's view that "the area of *per se* liability is carefully limited" (reply br. p. 3), and makes per se unlawful *any* withholding from non-members by a trade association any of its facilities or programs. This Court should reconsider whether the per se rule was applicable in this case.

III.

With respect to the damage period issue, this Court bases its decision "on the lack of surprise to appellants, and the trial theory pursued below. . . ." (P. 10.) We know of no authority, and this Court cites none, that a

supplemental pleading to enlarge, on the basis of acts occurring after the filing date, the relief requested is excused because of "lack of surprise" to the other party. Such a theory is fraught with danger and will work injustice in future cases as it does here. The burden is on the pleader to supplement his pleading if he desires to rely on post-filing circumstances. This burden was not satisfied by the pre-trial order. The order was not a supplemental pleading, either literally or by implication. The effect of this Court's opinion is to construe it as if it were. This is contrary to Rules 15(d) and 16 of the Federal Rules, opens the door to attempts to recover post-filing damages without supplemental pleadings, and shifts the burden to the opposite party. This Court should correct this departure from settled law.

The trial theory pursued by the appellants was that damages based on post-filing acts were not recoverable and evidence thereof was inadmissible. Appellee pursued the contrary theory. Appellants' objections and requested instructions[1] were refused by the district court, and they were forced to defend themselves on the lines drawn by the district court. To term these circumstances to be a "waiver" finds no support in either precedent or fairness. Appellee had the burden of preserving its position; the opinion of this Court has shifted that burden to the appellants.

IV.

Under long-standing decisions of this Court, appellants' motion for new trial on the ground the verdict was "grossly excessive" and was "not supported by the evidence" (R. 231), preserved for review the lack of evidence of both

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[1] The request clearly served as an objection to the charge since "it expresses a differing theory of law." (Op. p. 9, n. 3.)

the *fact* and *amount* of damages. This Court now holds to the contrary by stating "this claim was not raised at the trial — there was no motion for a directed verdict . . ." (p. 10). This is a departure from settled law, which this Court should correct.

This Court's opinion assumes appellants questioned only the lack of evidence of the *amount* of damages. No mention is made of their contention that, as to substantially all of the verdict, there was no evidence of the *fact* of damage. In turning its attention solely to the *amount* of damages, this Court has approved a substantial verdict based upon no evidence, or at best purely speculative evidence, to support the *fact* of damage. The absence of evidence of the *fact* of damage is an important issue deserving of this Court's consideration.

Respectfully submitted,

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Certificate of Counsel.

We certify that in our judgment the foregoing petition for rehearing is well founded and is not interposed for delay.

Samuel W. Block
Kenneth J. Burns, Jr.

February 25, 1966